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In the Supreme Court of the United States

OCTOBER TERM, 1994

SHARLENE WILSON, PETITIONER

v.

STATE OF ARKANSAS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether police officers violated the Fourth Amendment when, in executing a valid search warrant, they entered petitioner's home without first knocking and announcing their identity and purpose.

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INTEREST OF THE UNITED STATES

This case presents the question whether and under what circumstances the Fourth Amendment requires law enforcement officers executing a valid search warrant to knock and announce their identity and purpose before entering the premises. The Court's analysis and resolution of that question is likely to affect the admissibility of evidence offered in federal criminal prosecutions. Accordingly, the United States has an interest in the proper resolution of the question presented.

STATEMENT

After a jury trial in Arkansas, petitioner was convicted of delivery of marijuana, delivery of metham-

phetamine, possession of drug paraphernalia, and misdemeanor possession of marijuana. She was sentenced to 31 years' imprisonment on the felonies and one year's imprisonment on the misdemeanor, and fined $11,000. The Arkansas Supreme Court affirmed. J.A. 72-77.

1. On December 30, 1992, petitioner sold marijuana to an informant acting at the direction of a narcotics task force of the Arkansas State Police. The previous month, petitioner and her boyfriend, Bryson Jacobs, had twice sold narcotics (either marijuana or methamphetamine) to the same informant. Both of those sales had occurred at petitioner's home in Malvern, Arkansas, which she shared with Jacobs. J.A. 7-8, 15-16, 50-51.

The December 30, 1992, sale was arranged when the informant phoned petitioner's home and asked about buying marijuana. Jacobs answered the phone and told the informant that petitioner would return in ten minutes. When the informant called back, petitioner arranged to meet her at a local store. After meeting at the store, the informant entered petitioner's car, and the two drove to a nearby store to make change. In the car, petitioner asked the informant if she was working for the police and directed the informant to lift her shirt to check for a hidden tape recorder. Petitioner also produced a semi-automatic pistol, waved it in the informant's face, and several times threatened to injure or kill the informant if she turned out to be working for the police. Petitioner then sold the informant a bag of marijuana for $35. J.A. 15-16, 50-52.

The following day, state police officers, based on probable cause to believe that narcotics and a firearm were present, applied for and obtained a warrant to search petitioner's home. J.A. 46-48, 50-52. The police

also obtained warrants for the arrests of petitioner and Jacobs. The affidavit supporting the arrest warrants stated that Jacobs had previously been convicted of arson and firebombing. J.A. 7-8. The search of the home, conducted that afternoon, yielded marijuana, methamphetamine, valium, narcotics paraphernalia such as syringes, records of narcotics sales, a .25-caliber semi-automatic firearm, and various rounds of ammunition. J.A. 49, 53.

2. In the trial court, petitioner moved to suppress the evidence seized from her home on various grounds, including that the officers had failed to knock and announce before entering petitioner's home. J.A. 17-18.[1] At a suppression hearing, two officers testified regarding that claim. Officer Henry Efird, on whose affidavit the search warrant had been issued, testified that he was the fourth of six officers to enter the home; that he was exiting his car when the first officer entered; that he did not know whether the first officers to enter had announced their identity and purpose; and that, when he entered, he was told that petitioner had fled to the bathroom, and he found her there. J.A. 38-40. Officer Roger Walls testified that he and Officer Steve Smith were the first officers to enter the home, and that they entered by opening an unlocked screen door, the main door already being open. Officer Walls testified that he and Officer Smith observed petitioner, Jacobs, and two other persons in the living room, and "[W]e identified ourselves as police officers and told them we had a search warrant and entered while we were doing that. * * * [W]e entered the house upon announcement." J.A. 40-42.

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[1] Petitioner did not raise the knock-and-announce claim in her written motion to suppress, but did so orally at the suppression hearing immediately before the taking of testimony. J.A. 31.

Petitioner testified that she was in the bathroom at the time the police entered, that she heard no announcement, but that, hearing her son cry out, she left the bathroom and saw officers with guns drawn. J.A. 44-45. The district court summarily denied the suppression motion. J.A. 45.

3. On appeal to the Arkansas Supreme Court, petitioner argued that the seized evidence was admitted in violation of state and Fourth Amendment requirements that officers knock and announce before entering a home. The court noted that "[t]he testimony indicated that the officers entered the home while they were identifying themselves." J.A. 77. The court rejected the constitutional claim, noting that *Miller* v. *United States*, 357 U.S. 301 (1958), the sole case on which petitioner had relied, was inapposite, because it applied the federal announcement statute, 18 U.S.C. 3109. J.A. 77. The court concluded that "[t]here is no authority for [petitioner's] theory that the knock and announce principle is required by the Fourth Amendment." *Ibid.*[2]

SUMMARY OF ARGUMENT

The fundamental command of the Fourth Amendment is that searches and seizures be reasonable. That command extends not only to whether law enforcement agents have justification for a search or seizure, but also to the manner in which the search or seizure is conducted. An officer's announcement of his authority and

[2] The court also held that state law contained no knock-and-announce rule. On the contrary, the court noted, Arkansas law permits officers to "use such degree of force, short of deadly force, against persons, or to effect entry or to open containers as is reasonably necessary for the successful execution of the search warrant with all practicable safety." J.A. 77 (quoting Ark. R. Crim. P. 13.3).

purpose before entering a home to execute a warrant will often serve valid interests, including preventing violence and minimizing residents' surprise. In light of the long recognition of those interests by the common law, Congress, and the States, an officer's entry without an announcement of authority and purpose may be unreasonable under the Fourth Amendment if not adequately justified by the government's legitimate law enforcement interests.

There is, however, no absolute requirement that officers knock and announce before entering. As this and other courts have long recognized, officers may be able to establish a reasonable basis for entering a home without prior announcement, or simultaneously with an announcement. Those reasons include the need to avoid danger to the officers, to prevent the destruction of evidence, or to foil a suspect's escape. When the government shows that the officers had such a reasonable justification, the Fourth Amendment permits an unannounced entry to execute a search warrant.

The officers' entry of petitioner's home to execute a search warrant at the same time as they announced their purpose was reasonably justified in this case for two independent reasons. First, giving petitioner and her confederate Jacobs advance notice of a police entry could have placed the officers in physical peril. Officers entering the homes of drug traffickers often confront an unusually acute risk of violence, and awareness of that risk generally justifies an entry without prior announcement. Here, that risk was underscored by petitioner's threats to use her semi-automatic weapon to kill the informant, and by Jacobs' history of arson and firebombing. Second, if the police had given advance notice of their intent to enter, petitioner and Jacobs

could have taken the opportunity to destroy the readily disposable narcotics in the house that the officers sought to seize. In light of those concerns, the officers had reasonable justification for entering simultaneously with the announcement of their presence.

ARGUMENT

THE OFFICERS' ENTRY INTO PETITIONER'S HOME TO EXECUTE A VALID SEARCH WARRANT WAS LAWFUL

The question whether officers must announce their authority and purpose before entering a home to execute a search warrant must be answered by reference to the Fourth Amendment's requirement of reasonableness. An announcement of police authority before entering serves valid purposes, and it is unconstitutional to dispense with such notice without a reasonable basis. But the requirements of law enforcement make it reasonable in many cases to dispense with such an announcement in order to protect the safety of officers and others and to avoid the destruction of evidence. Because those considerations were present here, the entry in this case complied with the Constitution.

A. The Fourth Amendment Permits An Unannounced Entry To Execute A Search Warrant When Officers Have A Reasonable Justification For Making Such An Entry

1. The essential requirement of the Fourth Amendment is that searches and seizures be reasonable.[3] In

[3] The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

assessing the reasonableness of a particular law enforcement practice, the Court "balanc[es] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985) (quoting *United States* v. *Place*, 462 U.S. 696, 703 (1983)); *Maryland* v. *Buie*, 494 U.S. 325, 331 (1990); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983). The "balancing of competing interests" is "the key principle of the Fourth Amendment." *Michigan* v. *Summers*, 452 U.S. 692, 700 n.12 (1981).

Like other Fourth Amendment issues, the manner in which a search or seizure occurs is governed by the reasonableness requirement of the Fourth Amendment. *Garner*, 471 U.S. at 7-8; *Dalia* v. *United States*, 441 U.S. 238, 258 (1979); *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 559-560 (1978). The Court's examination of "the reasonableness of the manner in which a search or seizure is conducted" requires "balancing the extent of the intrusion against the need for it." *Garner*, 471 U.S. at 7-8; *id.* at 11 (Tennessee law authorizing officers to use deadly force against any fleeing felon cannot be constitutionally applied absent probable cause "to believe that the suspect poses a threat of serious physical harm[] either to the officer or to others"); see also *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987) (examining not only the particularity of a search warrant, but also the "reasonableness of the manner in which it was executed"); *Schmerber* v. *California*, 384 U.S. 757, 770-771 (1966) (extraction of blood from suspect, based upon

probable cause and carried out under exigent circumstances, constitutional when "performed in a reasonable manner"); *Winston* v. *Lee*, 470 U.S. 753, 759-760 (1985).

There is no express requirement in the text of the Fourth Amendment that officers knock and announce their identity and purpose before entering a building to execute a valid search or arrest warrant. Whether the Fourth Amendment requires an announcement of identity and purpose before officers make such an entry is, therefore, a question of the reasonableness of the manner of execution of the warrant. See *Ker* v. *California*, 374 U.S. 23, 38 (1963) (plurality opinion) ("examining * * * arrest to determine whether * * * the method of entering the home may offend federal constitutional standards of reasonableness"). To determine when, if ever, the Constitution requires that officers knock and announce, this Court must balance the privacy and other interests served by that practice against the law enforcement interests that may justify an entry without prior announcement. In undertaking that analysis, it is important to consider the common law background of, and purposes served by, a knock and an announcement before entry.

The common law contained a "deeply rooted" principle that officers must announce their identity and purpose before entering a home. *Miller* v. *United States*, 357 U.S. 301, 313 (1958); *Sabbath* v. *United States*, 391 U.S. 585, 589 (1968). As stated in *Semayne's Case*, 77 Eng. Rep. 194, 195 (1603): "In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors."

The common law thus generally required that officers, before entering a person's dwelling, knock on the door and announce their identity and purpose. The common law also required that officers not enter a home forcibly until their request to enter had been actually or constructively refused. 2 W. LaFave, *Search and Seizure* § 4.8(c), at 277-279 (2d ed. 1987); *Miller*, 357 U.S. at 308, 310 n.10. Most States have enacted variants of the common law rule. See *Miller*, 357 U.S. at 308; G. Robert Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. Pa. L. Rev. 499, 508-509 (1964) [hereinafter Blakey]. Congress has also embodied that rule in the federal knock-and-announce statute, enacted in 1917 and codified today at 18 U.S.C. 3109. That statute permits a federal officer to enter a home forcibly if, after giving "notice of his authority and purpose," he is "refused admittance."[4]

Requiring officers to announce their identity and purpose, and not to enter a home until refused admittance, furthers three distinct interests. The principal interest furthered is the reduction of the possibility that occupants will take violent defensive action based on the mistaken assumption that the entering party or parties are criminal intruders. Second, although the search or arrest warrant itself justifies a significant intrusion on

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[4] Section 3109 states: "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant." Although the statute refers only to search warrants, its criteria apply as well to the execution of arrest warrants. *Sabbath*, 391 U.S. at 588-589; *Miller*, 357 U.S. at 306; *Wong Sun* v. *United States*, 371 U.S. 471, 482-484 (1963).

the occupants' privacy interests, an announcement before entry tempers the invasion of privacy by reducing embarrassment or fright from a sudden entry. Third, a knock before entry prevents needless damage to the door of the home by giving occupants an opportunity to admit the officers peacefully. *Miller*, 357 U.S. at 307, 313; *Sabbath*, 391 U.S. at 589; LaFave, *supra*, § 4.8(a), at 272. In the rare case in which police have come to the wrong address, a knock before entry also enables occupants to correct that mistake before the police have entered. The role of pre-entry announcement in protecting those interests, and the longstanding endorsement of that practice including at the time that the Fourth Amendment was ratified, leave little doubt that it informs the meaning of the Fourth Amendment's requirement of "reasonableness." See *Payton* v. *New York*, 445 U.S. 573, 596-600 (1980); *Steagald* v. *United States*, 451 U.S. 204, 211-222 (1981). Thus, an officer's unannounced entry into a home may be unreasonable under the Fourth Amendment.

It has never been the law, however, that every entry must be preceded by an announcement.[5] An inflexible

[5] Notwithstanding its formulation in *Semayne's Case*, a case involving execution of a civil writ, the common law recognized exceptions to the announcement rule, as petitioner concedes. Pet. Br. 63. Announcement was not required when it would be a useless ceremony. See, *e.g.*, *Allen* v. *Martin*, 10 Wend. 300, 303 (N.Y. Sup. Ct. 1833) (reentry of home to recapture prisoner); *Howe* v. *Butterfield*, 58 Mass. (4 Cush.) 302, 305 (1849) (no one believed to be present to hear announcement); *Androscoggin R.R.* v. *Richards*, 41 Me. 233, 238 (1856) (no one present to hear announcement); *Hitchcock* v. *Holmes*, 43 Conn. 528, 531 (1876) (officer invited inside). Entry without announcement was also permitted when announcement could endanger the entering officer's life. See *Read* v. *Case*, 4 Conn. 166, 170 (1822) (where resident had pledged

requirement that officers announce their identity and purpose and then await a refusal of their request to enter would often injure vital law enforcement interests. A pre-entry announcement may imperil officers or other persons by giving persons inside time to arm themselves. It may also provoke and enable suspects to destroy the very evidence that is the subject of the search. Finally, it may facilitate escape. For those reasons, the federal courts have interpreted even the "unqualified" text, *Miller*, 357 U.S. at 309, of 18 U.S.C. 3109 to be subject to "exigent circumstances" exceptions. See *Sabbath*, 391 U.S. at 591 & n.8. These include where a pre-entry announcement could imperil officers or others, or enable suspects to destroy evidence or escape. See pages 17-29, *infra*. States with laws mandating police announcements have likewise found those laws subject to such exceptions. LaFave, *supra*, § 4.8(a) and (d)-(f), at 271,

to defend himself with a gun, to require officers to announce before entry would be a "palpable perversion" of the rule). And while the common law required announcement in misdemeanor cases, a dispute of authority existed whether it was required in felony cases. See Blakey, *supra*, 112 U. Pa. L. Rev. at 503, 544; 6 R. Burn, *Justice of the Peace* 365 (1845) ("[s]uch [a] request [to be given admittance] is undoubtedly necessary in all cases, where the warrant is for a *misdemeanour*"); *Commonwealth* v. *Reynolds*, 120 Mass. 190, 196 (1876) (announcement required in misdemeanor cases); compare 4 W. Blackstone, *Commentaries* 289 (1769) (when making warrantless arrest for felony, constable "is authorized (as upon a justice's warrant) to break open doors"; no reference to announcement requirement) with 3 W. Blackstone, *Commentaries* 412 (1768) (breaking of doors may be justified to execute civil writs "if the possession be not quietly delivered"). Compare *Payton*, 445 U.S. at 616 (White, J., dissenting) ("Even in cases of felony, the officers were required to announce their presence, demand admission, and be refused entry before they were entitled to break doors.").

280-287. As this Court has recognized, those statutory exceptions do not so much modify the common law rule as reflect a flexibility inherent in it. See *Sabbath*, 391 U.S. at 591 n.8; *Ker*, 374 U.S. at 39-40 (plurality opinion).

2. In light of that background, in the two cases in which this Court has evaluated claims that an unannounced entry violated the Fourth Amendment, the Court has recognized the need to balance the interests served by an announcement against the law enforcement interests at stake. In *Ker* v. *California*, *supra*, officers, without either knocking or announcing, unlocked the door to the home of suspect George Ker, entered, and made a warrantless arrest. The officers had followed Ker from the site of a drug transaction. A four-Justice plurality rejected Ker's claim that the unannounced entry violated the Fourth Amendment and that the narcotics evidence found in Ker's home incident to his arrest should be suppressed.[6] Justice Clark's opinion for the plurality assumed that the entry was a "breaking" within the meaning of the common law. 374 U.S. at 38. The plurality also assumed that, absent some justification for not doing so, the Fourth Amendment required that officers announce their identity and purpose before entering. But the unannounced entry of Ker's home was reasonable, the plurality stated, because

> justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police.

[6] Justice Harlan concurred in that result based on his view that the entry did not offend the "more flexible concept" of "'fundamental' fairness" under the Fourteenth Amendment. 374 U.S. at 44-46 (Harlan, J., concurring in the result).

Id. at 40; see also *id.* at 28 n.3 (noting officer's testimony that, in his experience, "on 'many, many occasions' * * * '[narcotics suspects] have flushed narcotics down toilets, pushed them down drains and sinks and [used] many other methods of getting rid of them prior to my entrance'").

In dissent, Justice Brennan, joined by three Justices, agreed that the Fourth Amendment permits officers to make an unannounced entry in designated circumstances:

> (1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.

374 U.S. at 47 (Brennan, J., dissenting). But he took a narrower view of the scope of the "exception" for "when officers have reason to believe that someone within is attempting to destroy evidence." *Id.* at 61 (Brennan, J., dissenting). Justice Brennan disavowed reliance on testimony "that in [officers'] general experience narcotics suspects destroy evidence when forewarned of the officers' presence," for reliance on such a profile was an unacceptable substitute for determining "whether circumstances exist in the *particular* case which allow an unannounced police entry." *Id.* at 63 (Brennan, J.,

dissenting). See *Sabbath*, 391 U.S. at 591 n.8 ("[e]xceptions to any possible constitutional rule relating to announcement and entry have been recognized") (citing *Ker*, 374 U.S. at 47 (Brennan, J., dissenting)).

In *Dalia* v. *United States*, *supra*, this Court again addressed the validity of an unannounced police entry—this time, in the context of a covert entry into a suspect's office to install equipment needed to conduct court-authorized electronic surveillance. The Court held that the entry was a reasonable means to prevent suspects from learning of the surveillance. The Court rejected the claim that "the Fourth Amendment prohibits covert entry of private premises in all cases, irrespective of the reasonableness of the entry." 441 U.S. at 246. On the contrary, the Court stated, it was "well established" that officers "may break and enter to execute a search warrant" where doing so "is the only means by which the warrant effectively may be executed." *Id.* at 247 (citing, *inter alia*, *Ker*). Thus, "officers need not announce their purpose before conducting an otherwise [duly] authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence." *Id.* at 247-248 (quoting *Katz* v. *United States*, 389 U.S. 347, 355 n.16 (1967)).[7]

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[7] In *Dalia*, the Court also rejected a claim that the Fourth Amendment required officers to obtain court authorization to make a covert entry. Rather, "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant—subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'" 441 U.S. at 257 (footnote omitted). Indeed, the Court stated that even when officers know at the time that they seek a search warrant that an unannounced or forced entry will be likely, they are not obliged to notify the issuing court or obtain advance approval of such entry. *Id.* at 257 n.19.

3. As *Ker* and *Dalia* suggest, while an entry may be constitutionally unreasonable if police do not knock and announce before entering, the government may be able to justify the entry by showing that law enforcement needs reasonably justified dispensing with a knock and announcement. Accordingly, when a defendant establishes that an entry was made without an announcement by the police followed by a reasonable delay to permit the occupant to admit the searching officers, the government must bear the burden of demonstrating a reasonable basis for its action. See *United States* v. *Mueller*, 902 F.2d 336, 344 (5th Cir. 1990); LaFave, *supra*, § 11.2(b), at 218-233; cf. *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 57 (1991); *United States* v. *Matlock*, 415 U.S. 164, 177 n.14 (1974); *Medina* v. *California*, 112 S. Ct. 2572, 2580 (1992). The police may not meet that burden simply with a blanket assertion that an unannounced entry is justified, for example, in every case involving drugs or firearms. But the government's burden is satisfied by showing either by virtue of the specific facts known to the police or by their general experience that an announcement before entry could have jeopardized safety or the purpose of the particular entry.

Petitioner contends (Br. 52, 62-64) that this Court should give considerable, "if not decisive," weight to the common law formulation of the knock-and-announce rule. This Court, however, "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton*, 445 U.S. at 591 n.33. Rather, it has weighed the

interests at stake in light of contemporary conditions and practices. See *Garner*, 471 U.S. at 14; *Steagald*, 451 U.S. at 217 n.10.

Petitioner also argues (Br. 63) that for an unannounced entry to satisfy the Fourth Amendment, the government should be required to show "exigent circumstances," as it must to justify noncompliance under 18 U.S.C. 3109. As we demonstrate at pages 18-29, *infra*, the lower courts' application of the exigent circumstances exceptions to Section 3109 supplies a useful guide to determining whether an unannounced entry was reasonably justified under the Fourth Amendment. Moreover, in practice, the difference between standards of "exigent circumstances" and "reasonable justification" will often prove semantic. But as a doctrinal matter, the Fourth Amendment inquiry into reasonableness is distinct from Section 3109's announcement command, as numerous courts of appeals have recognized.[8] Where an exigent circumstances test has been required, it has been to justify exceptions from express constitutional or statutory requirements, such as the Fourth Amendment's warrant requirement, see *Warden* v. *Hayden*, 387 U.S. 294, 298-299 (1967), or Section 3109's textually "unqualified" announcement requirement, see *Miller*, 357 U.S. at 309. But the text of the Fourth Amendment does not mandate an

[8] See *Rodriguez* v. *Butler*, 536 F.2d 982, 988 (2d Cir.) (Section 3109 is more restrictive than the Fourth Amendment), cert. denied, 429 U.S. 943 (1976); *United States* v. *Sagaribay*, 982 F.2d 906, 909-910 (5th Cir.) (same), cert. denied, 114 S. Ct. 160 (1993); *United States* v. *Moore*, 956 F.2d 843, 847 (8th Cir. 1992) (same); *United States* v. *Nolan*, 718 F.2d 589, 602 (3d Cir. 1983); (same); but see *United States* v. *Kennedy*, 32 F.3d 876, 882 (4th Cir. 1994) (Fourth Amendment and Section 3109 are coextensive), cert. denied, No. 94-6500 (Jan. 23, 1995).

announcement rule; as we have noted, any such constitutional requirement derives instead from the Amendment's broader requirement of reasonableness. Petitioner's view would unjustifiably elevate a knock-and-announce rule to the status of a textual command, and in the process could strip officers in the occasional case of some of the flexibility implicit in the textual standard of reasonableness.[9]

B. The Officers In This Case Were Justified In Entering Petitioner's Home Simultaneously With Their Announcement

In executing the search warrant in this case, the Arkansas police identified themselves immediately upon entering petitioner's home. The record discloses two justifications for the officers' decision to enter without waiting until permission to enter had been refused. First, a reasonable basis existed for believing that an announcement before entry would place the officers in peril. Second, a reasonable basis existed for believing that such an announcement would provoke persons inside the home to destroy easily disposable narcotics evidence.[10]

[9] This case does not present the question of the scope of any exclusionary rule remedy for an unlawful entry to execute a valid warrant, and the Court has never addressed that issue under the Fourth Amendment. Compare *New York* v. *Harris*, 495 U.S. 14, 18-19 (1990), and *Segura* v. *United States*, 468 U.S. 796, 815 (1984) with *Miller*, *supra*, and *Sabbath*, *supra* (both involving warrantless entries to make an arrest, in violation of 18 U.S.C. 3109).

[10] Petitioner argues (Pet. Br. 64-65) that because the officers were not asked at the suppression hearing whether they in fact harbored those concerns, the entry cannot be justified by reference to them. As this Court has noted, however, "[w]hether a Fourth Amendment violation has occurred 'turns on an objective

1. As the courts of appeals have recognized in applying the exigent circumstances exception to 18 U.S.C. 3109, it is reasonable to forgo announcement (or to enter simultaneously with announcement) when a reasonable basis exists to believe that advance notice of an entry would place the officers or others in peril. See, *e.g.*, *United States* v. *Spinelli*, 848 F.2d 26, 30 (2d Cir. 1988) (unannounced entry); *United States* v. *Kane*, 637 F.2d 974, 978-980 (3d Cir. 1981) (unannounced entry); *United States* v. *Kennedy*, 32 F.3d 876, 882-883 (4th Cir. 1994) (entry immediately after announcement), cert. denied, No. 94-6500 (Jan. 23, 1995); *United States* v. *Nabors*, 901 F.2d 1351, 1354 (6th Cir.) (entry immediately after announcement), cert. denied, 498 U.S. 871 (1990); *United States* v. *Whitney*, 633 F.2d 902, 905, 908-911 (9th Cir. 1980) (entry "[w]ithin seconds" of announcement), cert. denied, 450 U.S. 1004 (1981); *United States* v. *Artieri*, 491 F.2d 440, 442, 444 (2d Cir.) (entry three seconds after announcement), cert. denied, 417 U.S. 949 and 419 U.S. 878 (1974); *United States* v. *Streeter*, 907 F.2d 781, 788-789 (8th Cir. 1990) (entry five to ten seconds after announcement); *United States* v. *Bonner*, 874 F.2d 822, 826 (D.C. Cir. 1989) (entry ten seconds after announcement); see also Restatement (Second) of Torts § 206, cmt. d, at 387 (1965); *Read* v. *Case*, 4 Conn. 166, 170 (1822) (recognizing a common law "peril to officers" exception).

In such a situation, pre-entry announcement, or delay following announcement, could actually increase the

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assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' * * * and not on the officer's actual state of mind at the time the challenged action was taken." *Maryland* v. *Macon*, 472 U.S. 463, 470-471 (1985) (quoting *Scott* v. *United States*, 436 U.S. 128, 136 (1978)).

likelihood of violence. When the entering officers have a warrant to enter a home, the occupants' privacy interest is necessarily limited to the brief interval between the officers' announcement and their entry. That interest, while real, does not require police to refrain from practices reasonably tailored to ensuring their own safety. See *Terry* v. *Ohio*, 392 U.S. 1, 23 (1968) (stop and frisk of suspect for weapons based on reasonable suspicion justified by "immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him"); *Buie*, 494 U.S. at 333 (protective sweep of suspect's home based on reasonable suspicion justified by interest of police officer in assuring himself that the home "is not harboring other persons who are dangerous and who could unexpectedly launch an attack"); *Kane*, 637 F.2d at 978-979.[11]

An officer who prepares to enter a home of a suspected drug trafficker will often confront an unusually acute

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[11] In the federal system, federal agents virtually always announce their presence when executing a search warrant by demanding entry with language such as "FBI—we have a warrant to search your apartment—open the door." Even when officers do not believe that they can afford to delay the entry after announcing their authority and purpose, the announcement simultaneous with entry alerts the occupants to the presence of federal officials, and thereby reduces the risk that the agents will be mistaken for intruders. The FBI's policy in applying 18 U.S.C. 3109 states that "[w]here the Agent executing the warrant reasonably believes that by the announcement he/she will place himself/herself or other persons within [the] premises in imminent peril of bodily harm," entry may be accomplished without prior announcement. See *FBI Legal Handbook for Special Agents* §§ 5-2.2.2, 5-2.2.3(1) (1994); see also *id.* § 5-2.2.3(2)-(4) (recognizing other exceptions to Section 3109's announcement requirement).

risk of violence. There is a significant possibility that persons inside will be armed, sometimes with automatic or semi-automatic firearms such as machine pistols and assault rifles, and that the premises will have been fortified in anticipation of a police raid. See Kemal Mericli, *The Apprehension of Peril Exception to the Knock and Announce Rule—Part I*, 16 Search & Seizure L. Rep. 129, 129-130 (July 1989). Once an officer has announced his intention to enter a home to execute a search for contraband or to make an arrest, the drug trafficker has a heightened incentive to prevent the officer from attaining those goals. See Bureau of Justice Statistics, U.S. Dep't of Justice, *Drugs, Crime, and the Justice System: A National Report* 5 (Dec. 1992) ("To avoid being arrested and punished for trafficking, drug dealers commit violent crimes against police and threaten informants or witnesses."). Accordingly, "the law has uniformly recognized that substantial dealers in narcotics possess firearms" and that "entrance into a situs of drug trafficking activity carries all too real dangers to law enforcement officers." *Kennedy*, 32 F.3d at 882-883 (internal quotation marks omitted; citing cases); see *Bonner*, 874 F.2d at 824 (firearms are "tools of the [narcotics] trade," and "[o]nce police officers seeking to enter a drug traffickers' enclave have announced their identity and authority, they stand behind the door blind and vulnerable"); *United States* v. *Harris*, 435 F.2d 74, 81 (D.C. Cir. 1970) ("When the officers knocked on the door, they did not know whether they would be greeted in a normal manner or answered by a hail of bullets."), cert. denied, 402 U.S. 986 (1971); see also *United States* v. *Singer*, 943 F.2d 758, 762-763 (7th Cir. 1991); *State* v. *Stevens*, 511 N.W.2d 591, 596-597 (Wis. 1994), petition for cert. pending, No. 93-9026;

Commonwealth v. *Rodriguez*, 614 N.E.2d 649, 651 (Mass. 1993); *State* v. *Stalbert*, 783 P.2d 1005, 1007 (Or. Ct. App. 1989).

The issuance of a warrant to search the home or place of business of a suspected drug trafficker does not automatically meet the government's burden to show that an unannounced entry is reasonable. If, for example, officers know or have reason to know that the persons suspected of drug trafficking were not present within the building at the time of the entry and they have no other reason to believe that the persons inside presented a risk of danger, an unannounced entry based on a fear of peril would be unreasonable. It would also be unreasonable to make an unannounced entry on grounds of possible peril where the officers had reliable information (*i.e.*, from an informant) that the persons inside were unarmed. Compare *Sabbath*, 391 U.S. at 591 (exigency exception to Section 3109 inapplicable where "agents had no basis for assuming petitioner was armed or might resist arrest"). But otherwise, given the common possession of firearms by drug traffickers and the high risk of violence in apprehending them, law enforcement officers will generally be able to establish a reasonable basis for anticipating such danger in cases involving narcotics traffickers, and the Constitution does not prevent the officers from using the element of surprise to minimize that danger.[12]

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[12] It would not undercut the reasonableness of the officers' belief, however, to show that, unbeknownst to the officers in a particular case, the occupants of the dwelling were not in fact prepared to use violence. "It goes without saying that in determining the lawfulness of entry * * * we may concern ourselves only with what the officers had reason to believe *at the*

In this case, two specific facts known to the officers further justified a belief that the officers would face an increased risk of danger by delaying entry after an announcement. First, during the drug sale the previous day, petitioner had brandished a semi-automatic pistol and threatened to kill the informant if she proved to be cooperating with the police. Second, Jacobs, petitioner's confederate and housemate, had previously been convicted of crimes of violence: arson and firebombing. Those facts supplied an ample basis for believing that, given the opportunity to prepare to repel the officers with deadly force, petitioner and Jacobs might do so, and that an entry simultaneous with an announcement was therefore justified. Indeed, courts have often recognized those justifications in holding that officers were excused from complying with 18 U.S.C. 3109.[13]

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time of their entry." *Ker*, 374 U.S. at 40 n.12 (plurality opinion); cf. *Illinois* v. *Rodriguez*, 497 U.S. 177, 186 (1990).

[13] See *Singer*, 943 F.2d at 762-763 (unannounced entry valid where suspect, a drug trafficker, "was involved with guns and had made threats"); *Nabors*, 901 F.2d at 1354 (entry immediately after announcement valid where suspect was felon in possession of firearms and wore bulletproof vest); *Spinelli*, 848 F.2d at 29-30 (unannounced entry valid where suspect with reputation for violence was reasonably believed to be armed); *United States* v. *Pearson*, 746 F.2d 787, 792 (11th Cir. 1984) (entry simultaneous with announcement valid where defendant had prior convictions and was believed armed, and "agents knew they were walking into a dangerous situation that could quickly get out of control"); *Whitney*, 633 F.2d at 911 (entry within seconds of announcement valid where officers knew suspect had handgun, because "[t]he law does not require the officers to engage in a game of Russian roulette with a dangerous man"); *Kane*, 637 F.2d at 979-980 (unannounced entry valid where occupants known to possess weapons, apparently for purpose of protecting illegal drug business); *Artieri*, 491 F.2d at 444 (entry three seconds after

Petitioner contends (Pet. Br. 61-64) that because dangerous firearms have proliferated among criminals, the "risk of peril" rationale could allow an "exception" to "swallow[] the [knock-and-announce] rule." That contention is incorrect. As we have noted, even when searching for evidence of drug trafficking, if officers have reason to believe that a delay following announcement would pose no risk of danger, the officers would not be justified in dispensing with such a delay. Moreover, any "rule" based on the common law precept that an

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announcement valid where agents reasonably believed suspect "was likely to be armed"); *United States* v. *McShane*, 462 F.2d 5, 6 (9th Cir. 1972) (entry simultaneous with announcement valid where suspect was armed and had previously been convicted of firing weapon at police officer); cf. *United States* v. *Buckley*, 4 F.3d 552, 558 (7th Cir. 1993) (unannounced entry valid where suspect possessed guns and a pit bull), cert. denied, 114 S. Ct. 1084 (1994); *United States* v. *McConney*, 728 F.2d 1195, 1206 (9th Cir.) (en banc) ("When police have properly knocked and announced their identity and purpose, mild exigency is sufficient to justify simultaneous entry when entry can be accomplished without physical destruction of property."), cert. denied, 469 U.S. 824 (1984).

Some cases have taken a stricter approach. See *United States* v. *Marts*, 986 F.2d 1216, 1217-1218 (8th Cir. 1993) (entry less than five seconds after knocking and announcing violated Section 3109; "[t]he reasonable belief that firearms may have been within the residence," based on informant's having seen "numerous firearms" there during drug transactions, held "clearly insufficient"); *United States* v. *Mendonsa*, 989 F.2d 366, 370-371 (9th Cir. 1993) (entry three to five seconds after announcing violated Section 3109; neither fact that defendant was a drug dealer nor noises heard within house nor knowledge that defendant was on parole for armed robbery sufficient). In our view, those cases placed too great a burden on law enforcement officers to particularize the potential for violence before entering shortly after an announcement.

announcement should generally precede entry must be evaluated in light of the methods and means of contemporary criminal suspects. As this Court has observed: "Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper." *Steagald*, 451 U.S. at 217 n.10. The prevalence of firearms dictates that officers not always employ the same methods to protect themselves that were employed a century or more ago. See *Garner*, 471 U.S. at 14 (increased power of weaponry today dictates abandonment of blanket "fleeing felon" rule of common law); *Payton*, 445 U.S. at 591 n.33. That principle has generally been recognized under 18 U.S.C. 3109, see pages 18-19, *supra*, and it should be recognized in the Fourth Amendment context as well.

2. Apart from the threat to safety, the possibility that petitioner, Jacobs, or others would destroy narcotics in the house between announcement and entry justified entry simultaneous with announcement. Like the plurality in *Ker*, the courts of appeals, applying the exigent circumstances exception to 18 U.S.C. 3109, have consistently recognized that narcotics evidence is readily disposable, and that suspects, faced with an imminent police entry, tend to dispose of that evidence. In the vast majority of narcotics cases to present the issue, the courts have held that exigent circumstances justified full or substantial noncompliance with Section 3109. That has been so not only in the limited class of cases to which the *Ker* dissenters argued that the destruction-of-evidence "exception" should apply: where there is evidence unique to the case either that drugs

are likely to be destroyed on an announcement or that such drugs, after an announcement, are in fact being destroyed.[14] Instead, in numerous cases, the courts of appeals have allowed entry without an announcement,[15] or, as in this case, entry simultaneous with or seconds after an announcement,[16] even though no evidence of

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[14] See, *e.g.*, *Bonner*, 874 F.2d at 825-826 (sounds of possible destruction heard); *United States* v. *Allende*, 486 F.2d 1351, 1353 (9th Cir. 1973) (sounds of scampering feet heard), cert. denied, 416 U.S. 958 (1974).

[15] See, *e.g.*, *United States* v. *Arias*, 923 F.2d 1387, 1391 (9th Cir.) (unannounced entry based on dual concern that occupants "might be destroying evidence or arming themselves"), cert. denied, 502 U.S. 840, 876 (1991); *United States* v. *Tracy*, 835 F.2d 1267, 1270 (8th Cir.) (unannounced entry based on knowledge of similar drug sites where an announcement "would cause evidence to be destroyed before the officers could surmount the anticipated hindrances to their entry"), cert. denied, 486 U.S. 1014 (1988); *United States* v. *Garcia*, 741 F.2d 363, 366 (11th Cir. 1984) (announcement excused based on belief that suspect would be "able to wash the cocaine down the sink in the kitchen or bathroom"); *United States* v. *Tolliver*, 665 F.2d 1005, 1008 (11th Cir.) (unannounced entry where announcement "would have jeopardized the availability of evidence (the cocaine) which the agents knew to be inside"), cert. denied, 456 U.S. 935 (1982).

[16] See, *e.g.*, *Kennedy*, 32 F.3d at 882 (entry immediately after announcement based on belief that "the experienced drug distributors inside the house would attempt to destroy evidence unless the agents acted quickly"); *United States* v. *Markling*, 7 F.3d 1309, 1318 (7th Cir. 1993) (entry seven seconds after announcement where suspect was believed likely to flush cocaine down toilet); *United States* v. *Garcia*, 983 F.2d 1160, 1168 (1st Cir. 1993) (entry ten seconds after announcement where occupants were "believed to possess cocaine, a substance that is easily and quickly hidden or destroyed"); *United States* v. *Keene*, 915 F.2d 1164, 1168-1169 (8th Cir. 1990) (entry immediately after announcement based on fact that "persons who traffic in liquid narcotics often attempt to dispose of them, i.e., by pouring them

likely destruction existed apart from the assumption that the suspects in the home would conform to the tendency of narcotics suspects to destroy such incriminating contraband if they learn of an imminent entry.

The likelihood noted by the *Ker* plurality that a suspect will attempt hurriedly to dispose of narcotics evidence on learning that officers are about to enter his apartment or home is consistent with the experience of the police, as reflected in the numerous decisions (such as those cited above) that recount suspects flushing or pouring powdery, granular, leafy, and liquid narcotic substances down various indoor plumbing facilities (which did not exist at common law) as officers enter or prepare to enter. See *United States* v. *Carter*, 999 F.2d 182, 186 n.5 (7th Cir. 1993) ("it is a common practice for drug dealers to attempt to destroy the drug evidence when they are alerted to an imminent police search"). Indeed, during cross-examination at trial, petitioner herself admitted that, after the officers entered, she had flushed marijuana down the toilet, J.A. 68-70, and during the search, officers found a substance believed to be methamphetamine in the toilet, J.A. 53. In meeting the government's burden to justify an immediate entry, it is not necessary that police have case-specific proof that destruction of evidence is likely if entry is delayed, for it

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down a sink or floor drain"), cert. denied, 498 U.S. 1102 (1991); *Nabors*, 901 F.2d at 1354 (entry immediately after announcement based on belief that suspect had drugs "which could easily be disposed of"); *Nolan*, 718 F.2d at 598 (entry simultaneous with announcement based on belief that suspects would flush narcotics down toilet); *United States* v. *Jackson*, 585 F.2d 653, 662 (4th Cir. 1978) (entry simultaneous with announcement where suspects possessed gambling slips "susceptible of easy destruction").

is unrealistic to presume that such proof is available. Such a requirement, in fact, would often cost the police the very evidence that is the object of the search warrant. See Blakey, *supra*, 112 U. Pa. L. Rev. at 550.

Nevertheless, the existence of a warrant to search for and seize narcotics does not always supply a reasonable justification under the Fourth Amendment for officers to enter a home simultaneously with an announcement.[17] Here, as with the risk of peril to officers, a per se rule is not appropriate. In a particular case, the record may show that the officers had no reason to believe that narcotics evidence would likely be destroyed if advance notice were given of a police entry. For example, if the

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[17] The lower courts are divided on that issue. Applying the standard of reasonableness, seven state courts have held that the destruction-of-evidence justification applies whenever narcotics are reasonably believed to be present. See *Stevens*, 511 N.W.2d at 596 (Wisconsin); *State* v. *Knudson*, 499 N.W.2d 872, 876 (N.D. 1993) (citing *State* v. *Loucks*, 209 N.W.2d 772, 777-778 (N.D. 1973)); *State* v. *Eary*, 454 N.W.2d 685, 690 (Neb. 1990) (citing *State* v. *Meyer*, 311 N.W.2d 520, 524 (Neb. 1981)); *State* v. *Spisak*, 520 P.2d 561, 562-563 (Utah 1974); *People* v. *Lujan*, 484 P.2d 1238, 1241 (Colo. 1971); *People* v. *DeLago*, 213 N.E.2d 659, 661 (N.Y. 1965), cert. denied, 383 U.S. 963 (1966); *Henson* v. *State*, 204 A.2d 516, 519 (Md. 1964). Other courts have reached the same conclusion, provided the narcotics are believed to be packaged in quantities small enough to be quickly destroyed. See *Moore*, 956 F.2d at 850; *State* v. *Matos*, 605 A.2d 223, 224-225 (N.H. 1992); *Stalbert*, 783 P.2d at 1007. Other courts have reserved the question. *Hall* v. *Shipley*, 932 F.2d 1147, 1151 (6th Cir. 1991); *Rodriguez*, 536 F.2d at 987-988. But a number of state courts have rejected a "blanket" rule in narcotics cases. See *Moore*, 956 F.2d at 850 n.9 (citing cases); *Illinois* v. *Condon*, 113 S. Ct. 1359, 1360 (1993) (White, J., dissenting from denial of certiorari) (noting conflict); see Charles Garcia, Note, *The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception*, 93 Colum. L. Rev. 685 (1993).

officers knew that the only person at home at the time of the search is unconnected with the narcotics enterprise, that the premises contain no plumbing facilities, or that the narcotics are packaged (*i.e.*, in crates) so as to render them nondisposable within a brief period of time, then invocation of a destruction-of-evidence justification for an unannounced entry would be unreasonable.

Where, however, either the facts of the case or the officers' general experience suggests that an entry to execute a valid search warrant for narcotics could be frustrated by requiring officers to announce their identity and purpose at the time of entry and to wait outside the premises either for refusal of permission to enter or for any designated period of seconds, the officers may dispense with a delay of entry.[18] See *Ker*, 374 U.S. at 39-40 (plurality opinion) (at common law, compliance not required where it would frustrate purpose of making an arrest). The entry in this case conformed to that approach. The police announcement itself vindicated a principal goal of the premise that officers should identify themselves before entering: By notifying occupants that the entering parties are the police, the announcement minimized the possibility that occupants might mistake the entering parties as lawless intruders and use violent means to defend their homes. At the same time, the immediate entry eliminated the period of delay between

[18] Even when officers do delay entry, they may, of course, force entry when there has been an actual or a constructive refusal of admittance. If the officers are not admitted after the lapse of a reasonable period of time in which to open a door, officers may conclude that they have been refused entry. See LaFave, *supra*, § 4.8(c), at 278. As discussed in the text, the delay, although not the announcement of police purpose and authority, may be dispensed with when police reasonably believe it would permit destruction of evidence.

announcement and entry, in which destruction of evidence is likely to occur.[19] The Fourth Amendment did not compel the frustration of the purpose of the search while waiting for the occupants to permit entry.

CONCLUSION

The judgment of the Arkansas Supreme Court should be affirmed.

Respectfully submitted.

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[19] Petitioner argues that, because the judge who issued the warrant did not indicate that "the objects to be seized [we]re in danger of imminent removal" (Br. 65), destruction of evidence was not likely to occur. See *ibid.* ("[I]f destruction of evidence were a risk, why would the judge grant three days in which to search?"). The risk of destruction, however, did not exist independent of the search, but would have been triggered by the officers' announcement of their imminent entry. Moreover, there is no constitutional requirement that an entry without prior notice to the occupant be specified in the warrant. See *Dalia*, 441 U.S. at 257.